SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Plaintiff,

- v -

AMIR BOKTOR A/KA AMIR F. BOKTOR, DIANA SAHWANI BOKTOR A/K/A DIANA BOKTOR A/K/A DIANA SAHWANI-BOKTOR, BOARD OF MANAGERS OF 120 RIVERSIDE BOULEVARD AT TRUMP PLACE CONDOMINIUM, ENVIRONMENTAL CONTROL BOARD, PARKING VIOLATIONS BUREAU, TRANSIT ADJUDICATION BUREAU, JOHN DOES AND JANE DOES, SAID NAMES BEING FICTITIOUS, PARTIES INTENDED BEING POSSIBLE TENANTS OR OCCUPANTS OF PREMISES, AND CORPORATIONS, OTHER ENTITIES OR PERSONS WHO CLAIM, OR MAY CLAIM, A LIEN AGAINST THE PREMISES

Defendant.

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INDEX NO. 850251/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76

were read on this motion to/for JUDGMENT - SUMMARY

The motion by defendants Amir and Diana Boktor ("Moving Defendants") for summary judgment dismissing this action is granted.

Background

This foreclosure action arises out of a property owned by the Moving Defendants located at 120 Riverside Boulevard in Manhattan. In 2006, Mr. Boktor took out a loan for $1.048 million and plaintiff claims that the Moving Defendants stopped making monthly payments in February 2012. However, plaintiff's predecessor-in-interest brought a foreclosure action in 2009

that was later discontinued in September 2013. Then, in October 2013, plaintiff's predecessor-in-interest brought another foreclosure action that was also discontinued in September 2017. Plaintiff commenced the instant action on November 1, 2017.

Moving Defendants claim that the instant action is time-barred because plaintiff's cause of action accrued when the first action began in 2009 and expired on December 1, 2015. In opposition, plaintiff points out that Amir Boktor filed for bankruptcy in 2011 and reaffirmed his debt during the course of that litigation, which restarted the statute of limitations. Plaintiff also claims that the statute of limitations was restarted again when Amir Boktor entered into a trial modification plan in 2016.

In reply, Moving Defendants deny that the debt was reaffirmed. They claim that in order to acknowledge a debt, it must be unconditional and unqualified and plaintiff failed to cite anything that meets this requirement. With respect to the bankruptcy action, Moving Defendants acknowledge that Amir Boktor stated it was his intention to pay off the debt but a mere claim concerning a future act is not enough to restart the statute of limitations. Moving Defendants also argue that the trial modification plan cannot restart the statute of limitations because it is a conditional offer from plaintiff rather than a settlement agreement with a clear promise to pay a debt.

Background

"In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the

action was timely or [ ] raise an issue of fact as to whether the action was timely" (*MTGLQ Investors, LP v Wozencraft*, 2019 WL 2291865, 2019 NY Slip Op 04287 [1st Dept 2019] [internal quotations and citations omitted]). "[A]ctions are time-barred [where] they were commenced more than six years from the date that all of the debt on the mortgages was accelerated" (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529, 530, 48 NYS3d 597 (Mem) [1st Dept 2017]).

General Obligations Law § 17–101 "provides that an acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract in order to restart the statute of limitations. Under General Obligations Law § 17–105(1), a written promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage, either with or without consideration makes the time limited for the commencement of the action run from the date of the promise. Finally, under General Obligations Law § 17–107(2)(b), a partial payment on account of the indebtedness secured by a mortgage, is effective to revive an action to recover such indebtedness in favor of the mortgagee or his assignee or any other party who subsequently succeeds to an interest in the mortgage's enforcement" (*Pettito v Piffath*, 85 NY2d 1, 7, 623 NYS2d 520 [1994] [finding that a debtor's promise to pay a certain amount to settle a mortgage foreclosure case did not restart the statute of limitations because it was not an express acknowledgement of the indebtedness]).

Here, there is no dispute that there was a prior foreclosure action filed on December 1, 2009. The initial question for this Court is whether Amir Boktor's statement of intention filed in bankruptcy court on January 28, 2011 (NYSCEF Doc. No. 69) restarted the statute of limitations. In this document, defendant Boktor checks a box that states he is reaffirming the debt and claims the property as exempt (*id.*). The Court finds that this statement of intention is sufficient to

restart the statute of limitations under the General Obligations Law. It would be wholly inequitable for a debtor to state his intention to pay a mortgage debt in bankruptcy court (and presumably avoid having the property be sold as part of the bankruptcy proceeding) and then later disavow this claim in order to avoid a subsequent foreclosure proceeding. The Court observes that Mr. Boktor signed this document under penalty of perjury (*id.*). While that does not prevent Mr. Boktor from changing his mind, it is simply too convenient to allow him to do so under these circumstances.

However, a finding that the statute of limitations started to run on the date of this promise to pay (January 28, 2011) does not make the instant action (started on November 1, 2017) timely. Even assuming that Mr. Boktor's bankruptcy case tolled the statute of limitations further (*see* CPLR 204[a]), the fact is that Mr. Boktor's bankruptcy case was discharged on September 14, 2011. Six years from that date is September 14, 2017 and this case was commenced on November 1, 2017.

Under *Pettito* (cited above), the Court finds that the trial payment plan does not render the instant action timely. According to plaintiff, Mr. Boktor made payments pursuant to a *trial period plan*. This plan stated it was "the first step toward qualifying for more affordable mortgage payments" (NYSCEF Doc. No. 56 at 1). It also notes that "Upon successful completion of the Trial Period Plan, we will send you a Modification Agreement requiring your signature" (*id.* at 2). Clearly, this agreement was not an acknowledgement of a debt. Rather, Mr. Boktor promised to make (and did make) three payments while plaintiff agreed not to proceed to a foreclosure sale (*id.* at 4).[1] Therefore, the statute of limitations was not restarted in 2017 and this case is time-barred.

[1] There is no mention of a Modification Agreement in the record despite the fact that plaintiff admits Mr. Boktor made the three payments.

Summary

The Court observes that this result embraces the realities of a trial payment plan. It is merely an agreement to pause a foreclosure case in exchange for a few payments. It is not an agreement to pay the loan and, therefore, is not an acknowledgement of a debt. Otherwise, lenders could use this type of agreement to trick people into restarting the statute of limitations and then back out before agreeing to an actual modification of the loan. Under those circumstances, there would be no incentive for a borrower to enter the trial payment plan; he or she would be restarting the limitations period in exchange for the *chance* that the case might settle on affordable terms. That is not an equitable bargain.

Moreover, tricking borrowers into making a few payments with the promise of a possible permanent modification – which never materializes despite the borrower making the payments -- would probably run afoul of CPLR 3408's requirement that lenders negotiate in good faith. However, the Court recognizes that trial payment plans make good business sense; requiring borrowers (many of whom have not made a payment in years) to make a series of payments before entering into a settlement is logical. But that does not mean it should restart the limitations period.

The Court has no idea why plaintiff and its predecessor needed to start three cases to foreclose on this mortgage loan especially where the first two cases were discontinued pursuant to motions made by *plaintiff* (*see* NYSCEF Doc. Nos. 42, 44).[2] Six years is a considerable amount of time to commence a foreclosure action and somehow plaintiff failed to meet that

[2] To the extent that plaintiff claims it revoked the acceleration by discontinuing the previous cases, that claim is denied. A voluntary discontinuance is not an affirmative act of revocation and the purported billing statement sent by plaintiff is from May 2018 (after the instant litigation was commenced).

deadline even when including the Court's finding that the latest date the limitations period restarted was when the bankruptcy case was concluded in September 2011.

Accordingly, it is hereby

ORDERED that the motion by defendants Amir Boktor a/k/a Amir F. Boktor and Diana Sahwani Boktor a/k/a Diana Boktor a/k/a Diana Sahwani-Boktor for summary judgment dismissing this action is granted, with costs, upon presentation of proper papers therefor; and it is further

ORDERED that County Clerk is directed to cancel the Notice of Pendency filed in connection with the instant premises and the County Clerk and/or the City Register is directed to cancel the mortgage recorded in the Office of the City Register on June 5, 2006 (CFRN No. 200600311369).

10/31/19
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

HON. ARLENE P. BLUTH